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NO. 080956

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

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AT CHARLESTON

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CITY OF BRIDGEPORT, a West Virginia  
municipal corporation, and  
BRIDGEPORT POLICE CIVIL SERVICE COMMISSION,

Appellee,

vs.

ROBERT MATHENY,

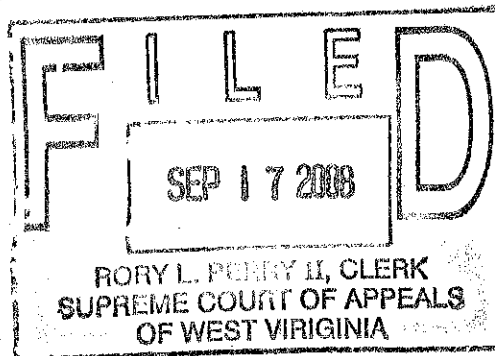
Appellant.

FROM THE CIRCUIT COURT OF  
HARRISON COUNTY, WEST VIRGINIA

REBUTTAL BRIEF ON APPEAL  
OF ROBERT MATHENY

Jerry Blair  
Attorney At Law, WVSB No. 5924  
*Blair, Conner & McIntyre-Nicholson PLLC*  
354 W. Main Street  
P. O. Box 1701  
Clarksburg, WV 26302-1701  
(304) 622-3334

Counsel for Appellant, Robert Matheny



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## **REBUTTAL BRIEF OF ROBERT MATHENY ON APPEAL**

**TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

### **I.**

#### **PROCEDURAL HISTORY**

This Court granted review of a Circuit Court declaratory judgment action filed by the City of Bridgeport and the Bridgeport Police Civil Service Commission that sought a ruling that Robert Matheny, appointed by the local Fraternal Order of Police to the Bridgeport Police Civil Service Commission, is, solely by virtue of his service as a Clarksburg Police officer, ineligible to serve as a Bridgeport Police Civil Service Commissioner. The Harrison County Circuit Court in Civil Action No.: 07-C-554 found that Mr. Matheny was ineligible to serve because the Circuit Court found that police officers are holders of a "public office." The Appellant sought review of that final "Memorandum Opinion and Order Concerning Declaratory Relief" entered on March 20, 2008, and subsequently timely filed a Petition to this Court, followed by a Brief On Appeal. This instant Rebuttal Brief on Appeal is timely submitted pursuant to the Court's Order entered on June 25, 2008.

### **II. ANOMALIES IN APPELLEE'S STATEMENT OF THE CASE**

Though the Appellant has heretofore stated that the facts of this matter are not in

dispute, the Appellees have made allegations in their responsive brief on appeal which appear to significantly differ from the record herein, most pertinently in regard to the chronology of events.

The Appellees allege [Page 2, Brief of Appellees] that “[c]orrespondence ensued between the City of Bridgeport and local FOP officials addressing whether Officer Matheny was eligible for appointment as a commissioner in light of his position as a police officer for the City of Clarksburg. The Mayor of the City of Bridgeport referred the FOP to W. Va. Code § 8-14-7, requesting an opinion from the FOP on the eligibility of Officer Matheny for appointment as commissioner.” The implication from the immediate prior sentence (*id.*) is that this occurred in “early 2007.” However, what actually happened (and of record) is that on February 27, 2007, Jack Clayton, then Chief of Police of the City of Bridgeport, sent an email to Matthew Wilfong, the Secretary of FOP Mountaineer Lodge No. 78, stating that Robert Matheny was ineligible to serve as appointed because “[b]eing a police officer constitutes holding an office of a political subdivision and prohibits him from being a commissioner,” and that Mr. Wilfong would be receiving an official letter to that effect from the mayor or the city attorney. Mr. Wilfong, months later, received a letter from Mayor Christie dated June 25, 2007. The lower court does not address the fact that the City of Bridgeport did not file its action until on or about September 11, 2007, approximately Seven

(7) Months following Mr. Matheny's appointment, and almost three months after any letter from the Mayor. This is not a mere technicality, but a critically significant fact because Code § 8-14-7 requires the Mayor to act within Ten (10) days if he or she has a problem with the appointment of a police civil service commissioner. That same Code section even goes as far to say that "In the event that the mayor shall fail to file his petition in the office of the clerk of the circuit court, as hereinbefore provided, within ten days after the removal of said commissioner or commissioners, such commissioner or commissioners shall immediately resume his or their position or positions as a member or members of the policemen's civil service commission." That means that the failure of the Mayor to cause an action to be timely filed herein is jurisdictional, contrary to the assertion of the Appellees that "[t]he timing of the Petition for Declaratory Relief is immaterial to the validity and enforceability of the Circuit Court's Memorandum Opinion and Order." (*Id. at 13*).

Even if, as the Appellees' brief suggests, that the Mayor early on invited a scholarly debate regarding the eligibility of Mr. Matheny, which is denied, the FOP was not required to engage in any academic discussion about whether or not Mr. Matheny was eligible, or, as the Appellees's Brief states "The FOP failed to respond to this request." *Id.* But there was no request, and the Mayor was required to take certain actions within certain time periods by statute which he did not take. If the Appellees's Brief is referring to the Mayor's June 27<sup>th</sup>

2007 letter, then it is important to note that *Mr. Matheny had attempted to convene meetings of the Commission in the intervening months, which meetings were refused by the other commissioners.* Mr. Matheny was effectively removed as a commissioner without any compliance with statute.

The matter of the appointment of Mr. Matheny was brought to the attention of the Bridgeport City Council at a meeting held on August 27, 2007. On August 28, 2007, the Chief of Police and Mr. Matheny met and discussed, among other things, the issue of a criminal investigation of individuals impeding his assumption of his role as Commissioner pursuant to West Virginia Code § 8-14-22. Mr. Clayton composed a letter to Mr. Matheny dated September 13, 2007 regarding their meeting. That letter stated that Mr. Matheny's "appointment has not been formally recognized by the Mayor." Further, it concedes that no further action or recognition by the Mayor or City Council is necessary regarding his appointment, and that "[y]our appointment is the sole responsibility of the FOP with no approval required by any City official."

**III.**

**ASSIGNMENTS OF ERROR**

**A.**

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY FINDING THAT A CITIZEN OF A MUNICIPALITY WHO IS EMPLOYED AS A POLICE OFFICER BY A DIFFERENT, WHOLLY SEPARATE MUNICIPALITY IS PROHIBITED FROM SERVING AS A COMMISSIONER ON THE POLICE CIVIL SERVICE COMMISSION IN THE CITY OF HIS RESIDENCE BECAUSE HIS EMPLOYMENT CONSTITUTES HOLDING A "PUBLIC OFFICE" WHEN THERE ARE MANY OTHER SUCH LAW ENFORCEMENT OFFICER POLICE COMMISSIONERS SERVING IN MUNICIPALITIES STATEWIDE.

**B.**

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY NOT ADDRESSING THE TIMELINESS ISSUE RAISED, I.E., THE FACT THAT THE CITY OF BRIDGEPORT DID NOT FILE ITS ACTION UNTIL ON OR ABOUT SEPTEMBER 11, 2007, APPROXIMATELY SEVEN (7) MONTHS FOLLOWING MR. MATHENY'S APPOINTMENT CONTRARY TO CODE § 8-14-7 NOR OTHER COMPLIANCE WITH STATUTORY NOTICE REQUIREMENTS CONSTITUTING AN INCURABLE WAIVER OF ANY PROTESTATIONS PETITIONERS BELOW MAY HAVE HAD REGARDING THE APPOINTMENT.

**IV.  
POINTS AND AUTHORITIES**

The Appellant stands upon its points and authorities previously submitted in this matter.



V.

**DISCUSSION OF LAW**

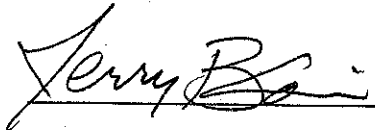
The Appellant stands upon its analysis of the law and legal argument heretofore submitted in this case.

**PRAYER FOR RELIEF**

WHEREFORE, your Appellant respectfully requests that his appeal be found meritorious, that the particular rulings of the circuit court be reversed, that the matter be remanded, and in any event, for whatsoever other relief may be necessary.

**YOUR APPELLANT, ROBERT MATHENY,**

**By Counsel,**

A handwritten signature in cursive script, appearing to read "Jerry Blair", is written over a horizontal line.

**JERRY BLAIR, WWSB # 5924**

**BLAIR, CONNER & McINTYRE-NICHOLSON PLLC**

**ATTORNEYS AT LAW**

**P.O. BOX 1701**

**CLARKSBURG WV 26302**

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CERTIFICATE OF SERVICE

On the 16<sup>th</sup> day of September 2008 came the Appellant and noticed the filing of his  
Rebuttal Brief on Appeal in this matter by depositing a true copy thereof in the United States  
Mail, postage pre-paid, and address to the following counsel of record:

Kathy Allen, Esq.  
*West & Jones*  
360 Washington Avenue  
Clarksburg, WV 26301



Jerry Blair  
Attorney At Law, WVSB No. 5924  
*Blair, Conner & McIntyre-Nicholson PLLC*  
354 W. Main Street  
P. O. Box 1701  
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